LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
APR 20 1970
JOHN F. DAVIS, CLERK

No. [redacted]113

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted]1970

HONORABLE BERNARD M. DECKER,
UNITED STATES DISTRICT JUDGE, et al.,
Petitioners,

vs.

HARPER & ROW PUBLISHERS, INC., et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604

SCHIFF HARDIN WAITE
DORSCHEL & BRITTON
231 South LaSalle Street
Chicago, Illinois 60604

SONNENSCHEIN, LEVINSON,
CARLIN, NATH & ROSENTHAL
69 West Washington Street
Chicago, Illinois 60602

WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10022

H. TEMPLETON BROWN
ROBERT L. STERN
LEE N. ABRAMS
Attorneys for William Morrow & Company, Inc.

W. DONALD MCSWEENEY
WILLIAM A. MONTGOMERY
Attorneys for The Bobbs-Merrill Company, Inc.,
G. P. Putnam's Sons

EARL E. POLLOCK
ALAN SILBERMAN
Attorneys for Baker & Taylor Co.

IRA M. MILLSTEIN
PETER GRUENBERGER
Attorneys for Charles Scribner's Sons,
E. P. Dutton & Company, Inc.,
Grossett & Dunlap, Inc.,
Harper & Row Publishers, Inc.,
Henry Z. Walck, Inc.

TWENTIETH CENTURY PRESS, INC., CHICAGO 60606

CHOATE, HALL & STEWART
28 State Street
Boston, Massachusetts 02109

CONRAD W. OBERDORFER
BRINTON P. ROBERTS
Attorneys for Houghton Mifflin Co.

SATTERLEE, WARFIELD & STEPHENS
277 Park Avenue
New York, New York 10017

WILLIAM E. STOCKHAUSEN
JOHN HORTON
Attorneys for Holt, Rinehart and Winston, Inc.

WINSTON, STRAWN, SMITH & PATTERSON
One First National Plaza
Chicago, Illinois 60670

EARL A. JENKINSON
JOHN W. STACK
Attorneys for Franklin Watts, Inc.

WHITE & CASE
14 Wall Street,
New York, New York 10005

EDGAR E. BARTON
KEVIN L. CARROLL
Attorneys for McGraw-Hill Book Company

GREENBAUM, WOLFF & ERNST
437 Madison Avenue
New York, New York 10022

LEO ROSEN
ROGER HUNTING
Attorneys for Thomas Y. Crowell Company, David McKay Co., Inc.

MCDERMOTT, WILL & EMERY
111 West Monroe Street
Chicago, Illinois 60603

SAMUEL WEISBARD
Attorney for Golden Press, Inc.

LINDEN & DEUTSCH
110 East 59th Street
New York, New York 10022

BELLA L. LINDEN
DAVID BLASBAND
Attorneys for The MacMillan Company

BELL, BOYD, LLOYD, HADDAD & BURNS
Suite 3400
135 South LaSalle Street
Chicago, Illinois 60603

JOHN T. LOUGHLIN
JOHN C. CHRISTIE
Attorneys for E. M. Hale and Company

SHEA, GALLOP, CLIMENKO
& GOULD
330 Madison Avenue
New York, New York 10017

BRUCE HECKER
DAVID P. LIST
KENNETH A. MANASTER
Attorneys for Campbell &
Hall, Inc.

LEIBMAN, WILLIAMS, BENNETT,
BAIRD & MINOW
Suite 2000
208 South LaSalle Street
Chicago, Illinois 60604

BROWN, FOX & BLUMBERG
231 South LaSalle Street
Chicago, Illinois 60604

NATHAN BLUMBERG
ROBERT W. BERGSTROM
Attorneys for Follett Library
Book Co.

BERGSTROM, ROHDE,
DAHLGREN & OLSON
39 South LaSalle Street
Chicago, Illinois 60603

INDEX

PAGE

OPINIONS BELOW 1

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 2

ARGUMENT 6

I. The Decision Below Is In Accord With The Overwhelming Weight of Authority and Is Not In Genuine Conflict With Any Other Court of Appeals Decision 6

A. *The Decision Below, Not the So-Called "Control Group" Test, Is In Accord With the Mass of Authority* 6

B. *The Decision of the Court of Appeals Comports With the Purposes Underlying the Attorney-Client Privilege, Which Would To a Substantial Extent Be Defeated Under the "Control Group" Test* 11

II. The Granting of Mandamus Was an Appropriate Exercise of Discretion by the Court of Appeals 17

AUTHORITIES CITED

CASES PAGE

American Express Warehousing v. *Transamerica Insurance Co.*, 380 F.2d 277 (2d Cir. 1967) 21

Atlantic Coast Line R. Co. v. *Williams*, 21 Ga. App. 453, 94 S.E. 584 (1917) 10

Atlas Heating & Ventilating Co. v. *Superior Court*, 208 Cal. App. 769, 25 Cal. Rep. 532 (1962) 10

Atlass v. *Miner*, 363 U.S. 641 (1960) 18, 20, 21

Bankers Life and Casualty Co. v. *Holland*, 346 U.S. 379 (1953) 18

Beach v. *Oil Transfer Corporation*, 23 N.Y. Misc. 47, 199 N.Y.S.2d 74 (Sup. Ct., Kings County, 1960) 10

Bifferato v. *States Marine Corp.*, 11 F.R.D. 44 (S.D. N.Y. 1951) 15

Blackburn v. *Crawfords*, 3 Wall. 175 (1865) 12

Brink v. *Multnomah County*, 244 Ore. 507, 356 P.2d 536 (1960) 10

Byers Theaters, Inc. v. *Murphy*, 1 F.R.D. 286 (W.D. Va. 1940) 9

D. I. Chadbourne, Inc. v. *Superior Court*, 60 Cal.2d 273, 36 Cal. Rptr. 468, 388 P.2d 700 (1964) 9, 14

Chirac v. *Reinicker*, 11 Wheat. (24 U.S.) 280 (1826) .. 12

City of Philadelphia v. *Westinghouse Electric Co.*, 210 F.Supp. 483 (E.D. Pa. 1962) petition for mandamus denied *sub. nom. General Electric Co.* v. *Kirkpatrick*, 312 F.2d 742 (3rd Cir. 1962), cert. den. 372 U.S. 943 (1963) 7, 21-22

Continental Oil Co. v. *United States*, 330 F.2d 347 (9th Cir. 1964) 21

Dairy Industries Supply Ass'n. v. *LaBuy*, 207 F.2d 554 (7th Cir. 1953) 18

PAGE

Davenport Co. v. *Pennsylvania R. Co.*, 166 Pa. 480, 31 Atl. 245 (1895) 10

Day v. *Illinois Power Company*, 50 Ill.App.2d 52, 199 N.E.2d 802 (5th Dist. 1964) 7

Ex parte Peru, 318 U.S. 578 (1943) 18

Ex parte Schoepf, 74 Ohio 1, 77 N.E. 276 (1906) 10

Fire Association of Philadelphia v. *Flemming*, 78 Ga. 733, 3 S.E. 420 (1887) 10

Garrison v. *General Motors Corp.*, 213 F.Supp. 515 (S.D. Cal. 1963) 7

Golminas v. *Fred Teitelbaum Construction Co.*, 112 Ill. App.2d 445, 251 N.E. 2d 314 (Ill.App.Ct. 1st Dist. 1969) 8

Hartley Pen Co. v. *United States District Court*, 287 F.2d 324 (9th Cir. 1961) 21

Hickman v. *Taylor*, 329 U.S. 495 (1947) 15, 16

Holm v. *Superior Court*, 42 Cal.2d 500, 267 P.2d 1025 (1954) 10

Honeywell, Inc. v. *Piper Aircraft Corp.*, 1970 CCH Trade Cases ¶ 73,122 (1970) 7

Humphries v. *Pennsylvania R. Co.*, 14 F.R.D. 177 (N.D. Ohio 1953) 15

Hunt v. *Blackburn*, 128 U.S. 464 (1888) 12

In re Hyde, 149 Ohio 407, 79 N.E.2d 224 (1948) 10

Jessup v. *Superior Court*, 151 Cal. App. 102, 311 P.2d 177 (1957) 10

LaBuy v. *Howes Leather Co.*, 352 U.S. 249 ..... 18, 19, 20

Natta v. *Hogan*, 392 F.2d 686 (10th Cir. 1968) 7, 8

Paper Converting Machine Co. v. *FMC Corporation*, 215 F.Supp 249 (E.D. Wisc. 1963) 9

PAGE

Platt v. *Minnesota Mining Co.*, 376 U.S. 240 (1964) 18, 20

Radiant Burners, Inc. v. *American Gas Association*, 320 F.2d 314 (7th Cir. 1963), cert. den. 375 U.S. 929 (1963) 12

Robertson v. *Commonwealth*, 181 Va. 520, 25 S.E.2d 352 (1943) 10

Roche v. *Evaporated Milk Association*, 319 U.S. 21 (1943) 18

Rucker v. *Wabash R.R. Co.*, 418 F.2d 146 (7th Cir. 1969) 15

Schlagenhauf v. *Holder*, 379 U.S. 104 (1964) 18, 20, 21

Schmitt v. *Emery*, 211 Minn. 547, 2 N.W. 2d 413 (1942) 10

Stewart Equipment Co. v. *Gallo*, 32 N.J. Super. 15, 107 Atl.2d 527 (1954) 9-10

United States v. *Aluminum Company of America*, 193 F.Supp. 251 (N.D. N.Y. 1960) 9

United States v. *American Radiator & Standard Sanitary Corp.*, 1958 Trade Cases ¶ 68,954 (W.D. Pa. 1958) 9

United States v. *Becton Dickinson & Company*, 212 F.Supp. 92 (D.N.J. 1962) 9

United States v. *Louisville & Nashville R.R.*, 236 U.S. 318 (1915) 11-12

United States v. *United Shoe Machinery Corporation*, 89 F.Supp. 357 (D. Mass. 1950) 9

Will v. *United States*, 389 U.S. 90 (1967) 18

Wise v. *Western Union Telegraph Co.*, 36 Del. 456, 178 Atl. 640 (1935) 10

Zenith Radio Corp. v. *Radio Corp. of America*, 121 F.Supp. 792 (D. Del. 1954) 9

STATUTES — PAGE

28 U.S.C. § 1292(b) 19

MISCELLANEOUS

5 Jones, *Commentaries on Evidence* 4136 (1926) 10

6 Moore, *Federal Practice*, § 54.10 [4], pp. 87-88 19

Model Code of Evidence, Rule 210 and Comment thereto 10, 16

Note, *The Lawyer-Client Privilege: Its Application to Corporations, the Role of Ethics, and Its Possible Curtailment*, 56 Northwestern U. L. Rev. 235 (1961) 10

Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, Rule 5-03(a)(3) 11

Uniform Rules of Evidence, Rule 26(3) 10

8 Wigmore, *Evidence* (McNaughton Rev. 1961)

§ 2291 12

§ 2317 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1337

HONORABLE BERNARD M. DECKER,
UNITED STATES DISTRICT JUDGE, et al.,
Petitioners,

vs.

HARPER & ROW PUBLISHERS, INC., et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 1970 CCH Trade Cases ¶ 73,084. The opinion of the District Court is reported at 1969 CCH Trade Cases ¶ 72,965. Both of those opinions are printed as appendices to the petition herein—the opinion of the Court of Appeals as Appendix A, and the opinion of the District Court as Appendix B—and citations to those opinions in this brief will be to the pages of those appendices to the petition.

QUESTIONS PRESENTED

1. Whether the attorney-client privilege protects the confidentiality of communications between an attorney for a corporation and an employee of that corporation in situations where, in the words of the Court of Appeals, "the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment"?

2. Whether the Court of Appeals properly exercised its discretion in issuing its writ of mandamus to direct that, in accordance with the above test, plaintiffs' counsel should not be permitted access to 17 attorneys' memoranda which reflect communications between the attorneys and employees of their corporate clients?

STATEMENT OF THE CASE

The petition herein arises out of discovery proceedings in certain private antitrust treble damage actions (alleging price-fixing in the sale of library editions of children's books) which have been consolidated for pretrial purposes (pursuant to 28 U.S.C. § 1407) before petitioner, Honorable Bernard M. Decker, Judge of the United States District Court for the Northern District of Illinois. The petitioners here are, in addition to Judge Decker, various plaintiffs in those treble damage actions ("plaintiffs"); respondents here are some of the defendants in those actions ("defendants").

In particular, the petition relates to plaintiffs' efforts to obtain disclosure of 17 attorneys' memoranda. Each of those memoranda was prepared by an attorney for one of the corporate defendants to describe a conference between that attorney and an employee of his corporate client.

Those attorneys' memoranda, as well as various other documents, were the subject of a motion for production of documents which plaintiffs filed in August, 1969. At that time defendants opposed disclosure of the 17 attorneys' memoranda in question, on the ground, *inter alia*, that the attorney-client privilege protected the confidentiality of those memoranda.*

In an opinion dated October 7, 1969, Judge Decker concluded that the attorney-client privilege did not extend to the 17 attorneys' memoranda. He held that the privilege preserves the confidentiality of communications between an attorney for a corporation and an employee of the corporation *only* if the employee is (1) "a responsible member of the corporation's management or control group", who is (2) seeking "legal advice about corporate affairs", *and* who also is (3) "in a position to influence the decision about which legal counsel is sought" (Appendix B, p. 17a). Judge Decker found that only two of the more than thirty attorneys' memoranda which were at issue before him related to attorneys' communications with employees of their corporate clients who were

> "in a position to influence their company's litigation strategy in these lawsuits. While other witnesses, such as sales executives and regional managers, might have shaped the pricing policies concerning library editions, they did not participate in the corporate problem about which legal advice was sought—the company's litigation response to the price fixing cases." (Appendix B, p. 18a).**

---

* The petition does not raise any question with respect to the other grounds urged by defendants in opposition to plaintiffs' motion for disclosure of those 17 attorneys' memoranda.

** In the same opinion, Judge Decker ordered (1) disclosure of nine of the eleven grand jury transcripts which plaintiffs also had re-

Continued on page 4

On October 17, 1969, Judge Decker entered an order incorporating the rulings which he had made in his October 7 opinion. Defendants requested that Judge Decker include in that order a statement of certification, pursuant to 28 U.S.C. § 1292(b), to permit an immediate appeal with respect to certain questions raised by the opinion, but Judge Decker denied the requested certification.

Defendants thereupon petitioned the Court of Appeals for the Seventh Circuit to issue a writ of mandamus compelling Judge Decker to vacate certain portions of his October 17, 1969 order. In a *per curiam* opinion dated February 4, 1970, the Court of Appeals held that a writ of mandamus should issue to prevent disclosure of the 17 attorneys' memoranda which reflect communications between attorneys for corporations and employees of their corporate clients.* The Court of Appeals concluded that Judge Decker had erred in holding that the protection

---

Footnote continued from page 3

quested at that time, and (2) production of certain other attorneys' memoranda which defendants had contended were protected by the work product doctrine and/or by an attorney-client privilege arising out of *personal* (as distinguished from *corporate*) attorney-client relationships. Those aspects of Judge Decker's opinion, which are treated in points (1), (3) and (4) of the opinion of the Court of Appeals, are not, of course, challenged in the petition. We mention them only because several of the quotations in the petition (pp. 4-5) are taken from inapposite portions of Judge Decker's opinion which relate to those subjects, *e.g.*, the existence of "particularized need" for disclosure of grand jury transcripts and the existence of "special circumstances" which warranted disclosure of attorneys' work product (which, unlike privileged attorney-client communications, is entitled only to qualified protection against disclosure).

* The Court of Appeals declined to issue the writ to prevent disclosure of certain other memoranda for which defendants had claimed confidentiality on other grounds.

which the attorney-client privilege affords to corporate clients should be limited by the so-called "control group" test. In particular, the Court of Appeals said:

> "We conclude that the control group test is not wholly adequate, that the corporation's attorney-client privilege protects communications of some corporate agents who are not within the control group, and that in those instances where the order here under attack must rest entirely upon the control group test, the order is unlawful.
>
> "It is clear that we are not dealing in this case with the communications of employees about matters as to which they are virtually indistinguishable from bystander witnesses; employees who, almost fortuitously, observe events which may generate liability on the part of the corporation. We express no opinion with respect to communications by employees who fall in that class.
>
> "We conclude that an employee at a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment." (Appendix A, p. 5a.)

In short, the Court of Appeals held that the so-called "control group" test unreasonably and improperly restricts the protection which the attorney-client privilege affords to communications between corporations and their attorneys, and concluded that

> "• • • because maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice, and because an appeal after disclosure of the privileged communica-

tion is an inadequate remedy, the extraordinary remedy of mandamus is appropriate." (Appendix A, p. 5a.)

ARGUMENT

Plaintiffs urge here that certiorari should be granted because the decision of the Court of Appeals allegedly conflicts (1) with decisions of this Court and of other courts of appeals (particularly the Third Circuit) regarding the standards which govern the issuance of writs of mandamus, and (2) with a decision of the Tenth Circuit regarding the scope of the protection which the attorney-client privilege affords to communications between corporations and their attorneys.

As we shall show in Point I, *infra*, review of the issue with respect to the attorney-client privilege is not warranted at this time. As we shall show in Point II, *infra*, the granting of mandamus here was entirely consistent with principles often approved by this Court and by the courts of appeals.

I. THE DECISION BELOW IS IN ACCORD WITH THE OVERWHELMING WEIGHT OF AUTHORITY AND IS NOT IN GENUINE CONFLICT WITH ANY OTHER COURT OF APPEALS DECISION.

A. The Decision Below, Not the So-Called "Control Group" Test, Is In Accord With the Mass of Authority.

At the outset, the narrow scope of the decision below should be recognized. The opinion of the Court of Appeals expressly disclaims any effect on "the communications of employees about matters as to which they are virtually indistinguishable from bystander witnesses; employees who, almost fortuitously, observe evidence which may generate liability on the part of the corporation" (Appendix A, p. 5a). The Court held the privilege applicable only

"where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment." (Appendix A, p. 5a.)

Despite these limitations, the petition extravagantly argues that "the Seventh Circuit's ruling conflicts with all relevant federal decisions regarding the scope of the corporate attorney-client privilege" (p. 13), and that "Judge Decker 'substantially followed' all relevant case law" (p. 9). That argument is patently in error.

The so-called "control group" test, on which plaintiffs rely, was first expounded in Judge Kirkpatrick's decision in *City of Philadelphia* v. *Westinghouse Electric Co.*, 210 F.Supp. 483 (E.D. Pa. 1962), petition for mandamus denied *sub nom. General Electric Co.* v. *Kirkpatrick*, 312 F.2d 742 (3rd Cir., 1962), cert. den. 372 U.S. 943 (1963). The doctrine has since been applied without reasoned analysis by the Tenth Circuit in *Natta* v. *Hogan*, 392 F.2d 686, 692 (1968), and by three federal district court judges.*

---

* *Garrison* v. *General Motors Corp.*, 213 F.Supp. 515 (S.D. Cal., 1963); *Honeywell, Inc.* v. *Piper Aircraft Corp.*, 1970 CCH Trade Cases ¶ 73,122, March 27, 1970; and Judge Decker in the instant case. As will be demonstrated *infra*, p. 15, the other federal district court cases cited in the petition on this point did not involve the "control group" test and are clearly inapposite. We have found only one other reported case in which the "control group" test has been approved—*Day* v. *Illinois Power Company*, 50 Ill. App. 2d 52, 199 N.E.2d 802 (5th Dist., 1964), where the court did not attempt to rationalize its ruling, but merely followed *City of Philadelphia* and *Garrison* unquestioningly. A subsequent decision by a different district of the Illinois Appellate Court initially refers to the "control group" test with seeming approval, but then interprets that test in a manner which would reach the same result that was reached by the Court of Appeals on the facts here.

Continued on page 8

In *Natta*, however, the briefs of the parties reveal that the corporate defendants did not deny, but on the contrary tacitly admitted, the existence and validity of the so-called "control group" test. They argued (unsuccessfully) *only* that the attorney-client privilege protected the confidentiality of the documents in question because each of those documents was a communication between a corporation's attorney and a member of the corporation's "control group". The court in *Natta* was asked to pass not upon the validity of the "control group" test, but only upon a disputed factual question—whether particular persons were members of the "control group" of the corporate defendant.* Consequently, there was no occasion for presentation of the authorities and reasons demonstrating why the "control group" test is unsound, and the court was not required to consider the pros and cons of that issue. Because the validity of the

---

Footnote continued from page 7

Golminas v. *Fred Teitelbaum Construction Co.*, 112 Ill.App.2d 445, 449-450, 251 N.E.2d 314, 318 (1st Dist., 1969). The court there said:

> "* * * For example, the principle underlying the attorney-client privilege would demand that an employee's communications *should be privileged when* [as here] *the employee of the defendant corporation is also a defendant or is a person who may be charged with liability* and makes statements regarding facts with which he or his employer may be charged, which statements are given or delivered to the attorney who represents *either* or both of them." (Emphasis supplied.)

* The corporate defendants in *Natta* expressly stated in their brief before the Court of Appeals that they were not questioning the trial court's "legal conclusions" regarding the attorney-client privilege:

> "Appellants have no quarrel with the legal conclusions reached in the opinion referred to [the trial court's opinion there], and assign no error therein. * * *" (Appellants' Br., p. 31.)

"control group" test was not in issue in that case, there is no genuine conflict between *Natta* and the decision below.

Moreover, the "control group" test has been rejected by the only court of last resort—the Supreme Court of California in *D. I. Chadbourne, Inc.* v. *Superior Court*, 60 Cal. 2d 273, 36 Cal. Rptr. 468, 388 P.2d 700, 709 (1964)—which has given full consideration to the problem in recent years. In that case, adopting substantially the same rule as the Seventh Circuit did in this case, the California Supreme Court held that the attorney-client privilege protects the confidentiality of a communication between an attorney and an employee of his corporate client when the employee (a) "is required [to make it] in the ordinary course of the corporation's business," *or* (b) "when the employee of a defendant corporation is also a defendant in his own right (or is a person who may be charged with liability)," *or* (c) when the communication relates to "the facts with which he or his employer may be charged," *or* (d) when, "under all circumstances of the case, [the employee] is the natural person to be speaking for the corporation."

That decision, like the decision below, was plainly in line with the mainstream of the law.* That the privilege ex-

---

* **Federal cases**: *United States* v. *United Shoe Machinery Corporation*, 89 F.Supp. 357, 359 (D. Mass., 1950); *Zenith Radio Corp.* v. *Radio Corp. of America*, 121 F.Supp. 792, 795 (D. Del., 1954); *Paper Converting Machine Co.* v. *FMC Corporation*, 215 F.Supp. 249, 251 (E.D. Wis., 1963); *United States* v. *American Radiator & Standard Sanitary Corp.*, 1958 Trade Cases ¶ 68,954 (W.D. Pa., 1958); *United States* v. *Aluminum Company of America*, 193 F.Supp. 251, 253 (N.D. N.Y., 1960); *United States* v. *Becton Dickinson & Company*, 212 F.Supp. 92, 93 (D. N.J., 1962); *Byers Theaters, Inc.* v. *Murphy*, 1 F.R.D. 286, 289 (W.D. Va., 1940).

State cases: *Schmitt* v. *Emery*, 211 Minn. 547, 2 N.W.2d 413, 416 (1942); *Stewart Equipment Co.* v. *Gallo*, 32 N.J. Super. 15, 107

Continued on page 10

tends to communications between a lawyer and his client's agent, without limitation except that the agent be acting in that capacity, was recognized by Dean Wigmore (and Professor McNaughton) as recently as the 1961 Edition of Wigmore's treatise on *Evidence*, Vol. 8, § 2317 (McNaughton Rev., 1961).* Accord, 5 Jones, *Commentaries on Evidence* 4136 (1926). Similarly, the American Law Institute's *Model Code of Evidence* (1942) in Rule 210 (c) (ii) and the Uniform Rules of Evidence (approved by the Commissioners on Uniform State Laws and the American Bar Association in 1953) in Rule 26(3) provide that the privilege covers communications between the lawyer and "a repre-

---

Footnote continued from page 9

Atl.2d 527, 528 (1954); *Beach* v. *Oil Transfer Corporation*, 23 N.Y. Misc. 47, 199 N.Y.S.2d 74, 77 (Sup.Ct., Kings County, 1960); *Fire Association of Philadelphia* v. *Flemming*, 78 Ga. 733, 3 S.E. 420 (1887); *Brink* v. *Multnomah County*, 244 Ore. 507, 356 P.2d 536, 540 (1960); *Jessup* v. *Superior Court*, 151 Cal. App. 102, 311 P.2d 177, 180, 182-183 (1957); *Holm v. Superior Court*, 42 Cal.2d 500, 267 P.2d 1025 (1954); *Atlas Heating & Ventilating Co.* v. *Superior Court*, 208 Cal. App. 769, 25 Cal. Rptr. 532 (1962); *In re Hyde*, 149 Ohio 407, 79 N.E.2d 224, 227 (1948); *Robertson* v. *Commonwealth*, 181 Va. 520, 25 S.E.2d 352, 360 (1943); *Wise* v. *Western Union Telegraph Co.*, 36 Del. 456, 178 Atl. 640, 642 (1935); *Atlantic Coast Line R. Co.* v. *Williams*, 21 Ga. App. 453, 94 S.E. 584, 586 (1917); *Ex parte Schoepf*, 74 Ohio 1, 77 N.E. 276 (1906); *Davenport Co.* v. *Pennsylvania R. Co.*, 166 Pa. 480, 31 Atl. 245 (1895).

* Dean Wigmore declares that "* * * A communication, then, by *any form of agency* employed or set in motion by the client is within the privilege. This of course includes * * * communications *originating with the client's agent* and made to the attorney." (Emphasis in original.)

See also *The Lawyer-Client Privilege: Its Application to Corporations, The Role of Ethics, and Its Possible Curtailment*, 56 Northwestern U. L. Rev. 235, 241 (1961) ("It has long been recognized that the [attorney-client] privilege fully applies where the communication originated with an agent of the client").

sentative of the client", or "an authorized representative", without other limitation.

The petition alludes to the Preliminary Draft of the Proposed Rules of Evidence, prepared by the Advisory Committee on Rules of Evidence, which comes close to adopting the "control group" test (Rule 5-03(a)(3)) (Advisory Committee Note, p. 80). But that Draft, of course, is only the tentative version which it purports to be, made without the benefit of the comments and criticisms which the Advisory Committee itself has solicited. Not only is the content of the final recommendation to be made by that Committee (which, of course, now has before it the Seventh Circuit decision in this case) presently unpredictable; whatever final form that recommendation may take will have to be approved by the Standing Committee on Rules of Practice and Procedure, by the Judicial Conference, and by this Court before it can become effective. What Rule 5-03 will then provide on this issue is entirely conjectural. If anything, the fact that the Advisory Committee has the matter now under consideration affords an additional strong reason for denying review at this time.

B. The Decision of the Court of Appeals Comports With the Purposes Underlying the Attorney-Client Privilege, Which Would To a Substantial Extent Be Defeated Under the "Control Group" Test.

The interpretation of the privilege adopted by the Court of Appeals, rather than the "control group" test, best permits the public purposes of the attorney-client privilege to be achieved. As this Court has stated, "The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well-known and has been too often recognized by textbooks and courts to need extended comment now. If such communications were

required to be made the subject of examination and publication, such enactment would be a practical prohibition upon professional advice and assistance." *United States* v. *Louisville & Nashville R.R.*, 236 U.S. 318, 336 (1915).

Almost 150 years ago, this Court, through Mr. Justice Story, declared that "it is indispensable for the purposes of private justice" that facts "communicated by client to counsel" in confidence should not be disclosed. *Chirac* v. *Reinicker*, 11 Wheat. (24 U.S.) 280, 294 (1826).* As numerous courts and commentators have recognized, the privilege encourages "freedom of consultation" by removing "the apprehension of compelled disclosure by the legal advisers" (8 Wigmore, *Evidence*, § 2291 (McNaughton Rev. 1961)).

The privilege extends to corporations as well as individual clients (*Radiant Burners, Inc.* v. *American Gas Association*, 320 F.2d 314 (7th Cir., 1963), cert. denied, 375 U.S. 929 (1963)). Outside of the "control group" cases, the privilege has long been held to cover communications from a client's agents as well as from the client himself, as we have shown *supra*, pp. 9-11.

For the privilege to be effective, it must—and does—apply both (1) to the advice given by the attorney in confidence and (2) to the statements made by the client (or by his agent) to the attorney upon which the attorney's advice or service necessarily is predicated. It applies to the spoken as well as to the written word. It applies to legal advice for whatever purpose sought. Plaintiffs' argument limits itself to a discussion of the privilege in the context of a statement made to an attorney and reduced to writing in the course of providing legal advice and service with re-

* To the same effect, see *Blackburn* v. *Crawfords*, 3 Wall. 175, 192-193 (1865); *Hunt* v. *Blackburn*, 128 U.S. 464, 470 (1888).

spect to litigation, pending or potential. But the scope and significance of the decision here under consideration is not so limited.

It is fair to say that application of the "control group" test would in major part destroy the protection provided by the attorney-client privilege to the modern corporation, and in turn would deprive the public of the benefit which it receives when a corporation's policies and procedures are based on well-informed legal advice. Plaintiffs have made no effort to deny this.

Effective use of legal advice requires that it be made available to all those persons whose actions it is intended to guide. A modern corporation, depending upon its size, may act through and be bound by the actions of hundreds or thousands of persons, few of whom have the power to control or determine what the company should do on the basis of its lawyer's advice. Any of them, however, may be equally in need of adequate legal advice with respect to conduct for which the company may be liable. The action of a purchasing agent or a salesman, for example, is more apt to place a corporation in violation of the Robinson-Patman Act than is the action of the president of a company. If it is in the public interest that persons, including corporations, be entitled to receive legal advice in confidence in order to prevent such violations, then it clearly is in the public interest that those who can benefit most from the advice should be able to receive it on a privileged basis.

The same principle applies with respect to attorneys' efforts to obtain information upon which to base legal advice. In order to give informed legal advice, the attorney must have not only knowledge of the law but also knowledge of the facts to which the law is to be applied. The privilege rests on the long accepted belief that it is in the public

interest that clients should be permitted to convey in confidence information upon which legal advice is to be predicated; obviously the information should come from those who are in the best position to provide it in complete and accurate form. The instances in which members of a corporation's "control group" could be expected to have complete firsthand knowledge of the facts needed by counsel will be rare indeed. If the attorney-client privilege is to serve a useful purpose in protecting this flow of information, it must protect attorneys' communications with those persons who have firsthand rather than, at best, hearsay knowledge of the pertinent facts. Under the "control group" test, however, most of the persons whose conduct is binding upon the corporation could not communicate confidentially with the corporation's attorney about the acts which they performed on its behalf and for which it is liable. Indeed, application of the "control group" test would mean that whatever such persons tell the company lawyer to enable him to advise and defend the company might have to be disclosed *by him* to the company's adversaries—perhaps even as a witness against his own client.

Thus, in every important respect application of the "control group" test would serve to defeat a basic purpose of the corporate attorney-client privilege—to encourage corporations to obtain reasoned and soundly based legal guidance in order that they may comply with the law. If full and frank discourse between client and attorney is in the public interest, application of the "control group" test is scarcely the means to accomplish that end.

The position taken by the Court of Appeals here, like that of the California Supreme Court in *Chadbourne, supra*, p. 9, accords the privilege the scope which it must have to achieve its purpose. It distinguishes between situations in which the attorney's advice is sought with respect to the employee's performance of his corporate duties and functions,

and those in which the employee may be a mere witness, as in *Hickman* v. *Taylor*, 329 U.S. 495, 508 (1947).*

This gives rational content to the concept of agency implicit in the pre-1962 authorities: namely, that the privilege applicable to communications between an agent and his principal's attorney should reach only statements which relate to the agent's duties as such on behalf of the principal. In contrast to the "control group" test, this interpretation of the privilege by the Court of Appeals is consistent with, and serves to effectuate, the public purposes underlying the privilege, and does not call for review by this Court.

The petition makes little or no effort to advance reasons

---

* In *Hickman*, this Court, specifically declining "to delineate the control and scope of the privilege," held only that "the privilege does not extend to information which an attorney secures from a witness * * *." (p. 508). Although it appeared there that some of the witnesses interviewed were employees of the attorney's client, there was no indication that they had any duties on behalf of the client with respect to the accident in question (p. 498). By contrast, in the instant case the communications in question dealt with the employees' performance of their duties, and the decision of the Court of Appeals here was based in large part on that factor (Appendix A, p. 5a).

The other cases cited by plaintiffs are likewise inapposite. *Humphries* v. *Pennsylvania R. Co.*, 14 F.R.D. 177, 179 (N.D. Ohio 1953), also involved statements by mere witnesses. In *Rucker* v. *Wabash R.R. Co.*, 418 F.2d 146, 154 (7th Cir. 1969), the opinion notes that "the statements do not appear to have been taken by the attorneys, but by investigators employed by the parties or their insurers" (418 F.2d at 154). Similarly, in *Bifferato* v. *States Marine Corp.*, 11 F.R.D. 44, 4647 (S.D.N.Y. 1951), the court emphasized the fact that the record did not show that the witnesses' statements in question were taken by *defendant's attorney*, and concluded that there apparently was not "any basic professional relationship" between the defendant and the individual who procured the witnesses' statements.

why the "control group" theory constitutes a sound rule of evidence. Plaintiffs' argument, apart from reliance upon the few "control group" cases as authority, is in essence that plaintiffs in private antitrust cases will be aided by having access to statements made by company officials to company attorneys, particularly when the communications are made long before the subsequent discovery or trial, when recollections inevitably are less vivid or accurate. This is, of course, true. It will always be helpful for any litigant to have access to confidential communications between his opponent and the opponent's attorney. In dealing with a similar argument in *Hickman* v. *Taylor*, 329 U.S. at 507, this Court admonished that "framing the problems in terms of assisting individual plaintiffs in their suits against corporate defendants is unsatisfactory." The problem, in this case as in that one, "far transcends" such situations, and must be viewed "in light of the limitless situations" to which the test espoused by plaintiffs would apply.

No one has suggested seriously, however, that the scope of the attorney-client privilege is different in antitrust cases than in other areas of the law, or that a special rule should be devised to aid antitrust plaintiffs. The privilege rests upon broader considerations of public policy which, as for all of the recognized privileges, "outweigh the harm that may come from the suppression of the evidence in specific cases." American Law Institute, *Model Code of Evidence* (1942), Comment to Rule 210, p. 147.

Moreover, the attorney-client privilege, when viewed in perspective, does not suppress the truth. It does not preclude a litigant from resorting to any source of information which would have been available if his adversary had not consulted an attorney, or from obtaining all relevant information from the persons having knowledge of the facts,

either in discovery or at trial. This includes the right to interrogate the opposing party or his agents or employees in depositions, and, as here, even to have access to the grand jury testimony of such persons. Thus the practical result of holding the privilege inapplicable is not to make existing or available information inaccessible, but merely to create another possible source of information—the lawyer—which but for the privilege might not exist. The principal effect of holding that the privilege applies thus would not be to create a barrier to discovery of the facts, but to encourage the full and candid disclosure to lawyers which is essential to effective representation and to the giving of useful legal advice.

The petition also asserts that the Seventh Circuit rule is ambiguous, unworkable and so confusing as to hamper private enforcement of the antitrust laws. Suffice it to say that that rule is far less difficult to apply than the "control group" test itself, and the opinion of the Seventh Circuit is much more explicit than earlier decisions which have tended to discuss the privilege in general rather than specific terms.*

II. THE GRANTING OF MANDAMUS WAS AN APPROPRIATE EXERCISE OF DISCRETION BY THE COURT OF APPEALS.

It is of course clear that not every wrongful exercise of discretion or every incorrect ruling on a legal question

---

* The petition suggests (p. 16) that the law of the forum state —here, Illinois—controls matters of privilege. But the two Illinois Appellate Court cases cited in the petition would differ on their application of the attorney-client privilege to the facts here involved. See fn., pp. 7-8, *supra*. In general, and apart from the "control group" cases themselves, the scope of the privilege has been the same in state and federal courts, as appears from the authorities cited *supra*, pp. 9-10, fn.

justifies the use of mandamus as a means of obtaining review of an interlocutory order. This Court has, however, often recognized—in the cases cited in the petition, *inter alia*—that in exceptional situations mandamus may properly issue "to confine an inferior court to a *lawful* exercise of its prescribed jurisdiction." *Schlagenhauf* v. *Holder*, 379 U.S. 104, 112 n. (1964); *Bankers Life and Casualty Co.* v. *Holland*, 346 U.S. 379, 383 (1953); *Platt* v. *Minnesota Mining Co.*, 376 U.S. 240, 245 (1964); *Will* v. *United States*, 389 U.S. 90, 95 (1967), all quoting from *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 26 (1943). Indeed, this Court's decisions establish that mandamus, on occasion, may issue even to correct "a clear abuse of discretion." *Schlagenhauf, supra*, at p. 111; *Bankers Life, supra*, at p. 383; *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 257 (1957).

The use of the writ to correct an error of law manifestly is appropriate when the matter is of great importance to the litigants or to the public interest, or (as here) to both, and no other adequate remedy is available. Thus, mandamus has issued to correct interlocutory rulings which misinterpreted a rule of court (*Schlagenhauf, supra; Atlass* v. *Miner*, 363 U.S. 641, 649 (1960)), employed an inappropriate criterion or relied on improper factors in applying a statute (*Platt, supra; Dairy Industries Supply Ass'n* v. *LaBuy*, 207 F.2d 554, 558 (7th Cir., 1953)), or failed to heed a non-statutory principle of international law (*Ex parte Peru*, 318 U.S. 578 (1943)).

Obviously, no litmus test is available by which conformity to the above general principles can be determined. This Court has often stated, and plaintiffs conceded before the Court of Appeals (Answer to Petition for Mandamus, p. 16), that "the common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the

Court" (Ex parte Peru, supra, at p. 584; *Schlagenhauf, supra,* at p. 112 n.). Similarly, in *LaBuy* v. *Howes Leather Co., supra,* at p. 260, this Court said that "The All Writs Act confers on the Courts of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances existing here." See also 6 Moore, *Federal Practice,* § 54.10[4], pp. 87-88.

In the exceptional circumstances presented here, and given the Court of Appeals' wide range of discretion, there is no reason for this Court to undertake further review of its decision. Indeed, the care exercised by the Court of Appeals is demonstrated by its refusal to issue mandamus with respect to any aspect of the trial court's decision which involved an element of discretion, whether or not it agreed with the trial court's action in that respect (see Appendix A, pp. 6a-7a). Whether the attorney-client privilege is to be limited by interjection of the "control group" test, however, obviously is a question of law, not of trial court discretion.*

Nor was any other effective remedy available to defendants with respect to the trial court's ruling. The trial court had barred other avenues of appellate relief by refusing certification under 28 U.S.C. § 1292(b), and by refusing a request that the 17 attorneys' memoranda be returned to defendants' counsel, so that counsel would have an opportunity to challenge the propriety of the trial court's order through contempt proceedings (if they chose to do so). Thus if the Court of Appeals had not issued its writ

---

* Plaintiffs' intimation (Petition, p. 10) that "mandamus is an especially inappropriate remedy for review of discovery orders within the discretion of the trial judge" is entirely inapposite, since the Court of Appeals here clearly did *not* issue mandamus with respect to any discovery order "within the discretion of the trial judge".

of mandamus, the privileged documents would have been turned over to the plaintiffs immediately, and the privilege would have been lost irretrievably. As a practical matter, such an error cannot be rectified years after the confidential information has been disclosed, even if a reviewing court finally determines, after trial, that the documents were privileged.

In a number of cases this Court and the courts of appeals have granted mandamus to correct misinterpretations of important statutes or rules of court. See cases cited *supra*, p. 18. There is no less reason for granting mandamus when a trial court threatens to emasculate a common law rule which was universally accepted until 1962, and which only a handful of courts have failed to follow since that date. The impact of the "control group" test upon the public interest in enabling attorneys to provide legal service on the basis of candid disclosure of the relevant facts is far more pervasive and significant than the impact of the issues which were presented in many of the decisions which this Court has held were properly overturned by writs of mandamus—whether Rule 35 permits a court to order a physical examination of a defendant as well as of a plaintiff *(Schlagenhauf, supra)*, when masters can properly be used *(La Buy v. Howes Leather Co., supra)*, what factors should be considered in applying 28 U.S.C. § 1404(a) *(Platt, supra)*, or even whether discovery depositions are proper in admiralty cases *(Atlass, supra)*.

Indeed, this Court and the courts of appeals have held that mandamus was an appropriate remedy in many discovery situations—to vacate an order requiring a defendant (a bus driver whose allegedly poor vision had caused an accident) to undergo a physical examination *(Schlagenhauf, supra)*, to overturn a trial court order granting claimants in an admiralty action leave to take certain spec-

ified depositions for discovery purposes only (*Atlass, supra*), to overturn an order restricting the scope of the attorney-client privilege (in another respect) as grounds for approving grand jury subpoenas which sought disclosure of attorneys' memoranda virtually identical to those involved here (*Continental Oil Co.* v. *United States*, 330 F.2d 347, 349 (9th Cir., 1964)), and to prevent disclosure of a trade secret (*Hartley Pen Co.* v. *United States District Court*, 287 F.2d 324 (9th Cir., 1961)).

In the Second Circuit's recent decision in *American Express Warehousing Co.* v. *Transamerica Insurance Co.*, 380 F.2d 277 (2d Cir., 1967), relied upon in the petition (pp. 10-11), all three Court of Appeals judges recognized that mandamus might have been appropriate if the "interesting question" as to "whether work-product extends to work done by agents of an attorney" (p. 283) (a question not dissimilar from that involved here) *had actually been decided below*. The majority there denied the writ, however, because the District Court did not "reach this interesting question." Chief Judge Lumbard, dissenting, would have granted the writ on the ground that mandamus was an appropriate vehicle for determining, for the guidance of the district courts in that Circuit, an important question as to which the authorities were not in harmony.

The *Schlagenhauf, Atlass, Hartley Pen, Continental Oil* and *American Express* cases are examples of judicial recognition that mandamus may properly be granted to correct an unlawful exercise of authority in connection with discovery when the questions of law are of substantial public importance and no other remedy is available.

Plaintiffs here contend (Petition, pp. 8, 12) that the granting of mandamus by the Seventh Circuit conflicts with the Third Circuit's denial, in *City of Philadelphia, supra*,

of an application for prohibition or mandamus to review Judge Kirkpatrick's decision adopting the "control group" test. The reasons for the Third Circuit's bare *per curiam* order denying that application (by a two-to-one vote, Chief Judge Biggs dissenting) are, of course, unknown. In that case, however, Judge Kirkpatrick had found (210 F.Supp. at 484, 486) that the corporation's lawyer had advised the employee that "if it should turn out that they [the employee's disclosures] revealed a violation of written company policy directives, the lawyer would 'report that fact to management,' * * * thus sharply differentiating the witness from 'the management,' meaning, of course, the corporation." This, Judge Kirkpatrick found, disposed of "any possible claim that the communications were confidential" (p. 484). The "control group" test thus was actually unnecessary to Judge Kirkpatrick's decision. The facts referred to in the above quotation, which are not present here, may well have been the basis for the Third Circuit's summary denial of the writ. In any event, it is well-settled that mandamus "may be granted or withheld in the sound discretion of the Court" *(supra,* pp. 18-19). Clearly, then, the exercise of discretion to grant the writ in one case can scarcely be regarded as being in conflict with another court's unexplained exercise of discretion to deny the writ in another case.

CONCLUSION

For the above reasons, the petition for certiorari should be denied.

Respectfully submitted,

MAYER, BROWN & PLATT
231 South LaSalle Street
Chicago, Illinois 60604

H. TEMPLETON BROWN
ROBERT L. STERN
LEE N. ABRAMS
Attorneys for William Morrow & Company, Inc.

SCHIFF HARDIN WAITE DORSCHEL & BRITTON
231 South LaSalle Street
Chicago, Illinois 60604

W. DONALD MCSWEENEY
WILLIAM A. MONTGOMERY
Attorneys for The Bobbs-Merrill Company, Inc., G. P. Putnam's Sons

SONNENSCHEIN, LEVINSON, CARLIN, NATH & ROSENTHAL
69 West Washington Street
Chicago, Illinois 60602

EARL E. POLLOCK
ALAN SILBERMAN
Attorneys for Baker & Taylor Co.

WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, New York 10022

IRA M. MILLSTEIN
PETER GRUENBERGER
Attorneys for Charles Scribner's Sons, E. P. Dutton & Company, Inc., Grossett & Dunlap, Inc., Harper & Row Publishers, Inc., Henry Z. Walck, Inc.

CHOATE, HALL & STEWART
28 State Street
Boston, Massachusetts 02109

CONRAD W. OBERDORFER
BRINTON P. ROBERTS
Attorneys for Houghton Mifflin Co.

SATTERLEE, WARFIELD & STEPHENS
277 Park Avenue
New York, New York 10017

WILLIAM E. STOCKHAUSEN
JOHN HORTON
Attorneys for Holt, Rinehart and Winston, Inc.

WINSTON, STRAWN, SMITH & PATTERSON
One First National Plaza
Chicago, Illinois 60670

EARL A. JINKINSON
JOHN W. STACK
Attorneys for Franklin Watts, Inc.

WHITE & CASE
14 Wall Street
New York, New York 10005

EDGAR E. BARTON
KEVIN L. CARROLL
Attorneys for McGraw-Hill Book Company

GREENBAUM, WOLFF & ERNST
437 Madison Avenue
New York, New York 10022

LEO ROSEN
ROGER HUNTING
Attorneys for Thomas Y. Crowell Company, David McKay Co., Inc.

MCDERMOTT, WILL & EMERY
111 West Monroe Street
Chicago, Illinois 60603

SAMUEL WEISBARD
Attorney for Golden Press, Inc.

LINDEN & DEUTSCH
110 East 59th Street
New York, New York 10022

BELLA L. LINDEN
DAVID BLASBAND
Attorneys for The MacMillan Company

BELL, BOYD, LLOYD, HADDAD & BURNS
Suite 3400
135 South LaSalle Street
Chicago, Illinois 60603

JOHN T. LOUGHLIN
JOHN C. CHRISTIE
Attorneys for E. M. Hale and Company

SHEA, GALLOP, CLIMENKO & GOULD
330 Madison Avenue
New York, New York 10017

LEIBMAN, WILLIAMS, BENNETT, BAIRD & MINOW
Suite 2000
208 South LaSalle Street
Chicago, Illinois 60604

BRUCE HECKER
DAVID P. LIST
KENNETH A. MANASTER
Attorneys for Campbell & Hall, Inc.

BROWN, FOX & BLUMBERG
231 South LaSalle Street
Chicago, Illinois 60604

BERGSTROM, ROHDE, DAHLGREN & OLSON
39 South LaSalle Street
Chicago, Illinois 60603

NATHAN BLUMBERG
ROBERT W. BERGSTROM
Attorneys for Follett Library Book Co.